IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-653

WILLIAM SWISHER, ET AL.,
Appellants,

v.

DONALD BRADY, ET AL.,
Appellees.

APPEAL FROM A UNITED STATES DISTRICT COURT OF THREE JUDGES FOR THE DISTRICT OF MARYLAND

BRIEF OF APPELLANTS

FRANCIS B. BURCH,
Attorney General of Maryland,
GEORGE A. NILSON,
Deputy Attorney General,
CLARENCE W. SHARP,
Chief, Criminal Division
Assistant Attorney General,
ALEXANDER L. CUMMINGS,
Assistant Attorney General,
One South Calvert Street,
Baltimore, Maryland 21202,
383-3737,
Attorneys for Appellants.

The Daily Record Co., Baltimore, Md. 21202

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes and Rules

Constitutional Provisions

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-653

WILLIAM SWISHER, ET AL.,
Appellants,

v.

DONALD BRADY, ET AL.,
Appellees.

APPEAL FROM A UNITED STATES DISTRICT COURT OF THREE JUDGES FOR THE DISTRICT OF MARYLAND

BRIEF OF APPELLANTS

OPINION BELOW

The District Court issued its opinion on September 16, 1977. The opinion has been reported. See *Brady v. Swisher,* 436 F. Supp. 1361 (D. Md. 1977). It is also reprinted at pages 1a to 18a of the Appendix to the Appellants' Jurisdictional Statement (AJS. 1a).[1]

[1] References to the Appendix to the Jurisdictional Statement will be referred to as "AJS" and references to the Appendix to this Brief for Appellants as "A." The pagination in the Appendix to the Jurisdictional Statement is in the form of "1a, 2a, 3a, . . ." while that of the Single Joint Appendix is "A.1A, A.2A, A.3A, . . ."

JURISDICTION

The jurisdiction to entertain this appeal from a decision of a United States District Court sitting as a court of three judges is premised upon 28 U.S.C., Section 1253. The three judge court was convened in this case pursuant to the authority of 28 U.S.C. Section 2281 and 2284 as the relief sought in this case filed November 25, 1974 was an injunction to prevent enforcement of the state statute and rules promulgated thereunder. Although Section 2281 was repealed effective August 12, 1976 and Section 2284 was amended effective that same date, the appeal here is nevertheless proper under Section 1253 because repeal and amendment of these sections does not effect causes of action commenced on or before August 12, 1976. Section 7, Pub. L. 94-381 (28 U.S.C., Section 2284). The judgment of the District Court was entered on September 19, 1977, when the District Court issued its final order granting Appellees declaratory and injunctive relief. Appellants noted an appeal on October 14, 1977 and probable jurisdiction was noted by this Court on November 28, 1977.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment 5:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

Maryland Code (1977 Repl. Vol.) Volume 9B, Rule 911 of The Maryland Rules of Procedure, which the District Court determined was unconstitutional insofar as it permitted the State to file exceptions to a juvenile court master's proposed findings and recommendations, reads as follows:

Rule 911. Masters.

a. Authority.

1. Detention or Shelter Care.

A Master is authorized to order detention or shelter care in accordance with Rule 912 (Detention or Shelter Care) subject to an immediate review by a judge if requested by any party.

2. Other Matters.

A Master is authorized to hear any cases and matters assigned to him by the court, except a hearing on a waiver petition. The findings, conclusions and recommendations of a master do not constitute orders or final action of the court.

b. Report to the Court.

Within ten days following the conclusion of a disposition hearing by a master, he shall transmit to the judge the entire file in the case, together with a written report of his proposed findings of fact, conclusions of law, recommendations and proposed orders with respect to adjudication and disposition. A copy of his report and proposed order shall be served upon each party as provided by Rule 306 (Service of Pleadings and Other Papers.)

c. Review by Court if Exceptions Filed.

Any party may file exceptions to the master's proposed findings, conclusions, recommendations or proposed orders. Exceptions shall be in writing, filed with the clerk within five days after the master's report is served upon the party, and shall specify those items to which the party excepts, and whether the hearing is to be *de novo* or on the record. A copy shall be served upon all other parties pursuant to Rule 306 (Service of Pleadings and Other Papers).

Upon the filing of exceptions, a prompt hearing shall be scheduled on the exceptions. An excepting party other than the State may elect a hearing *de novo* or a hearing on the record. If the State is the excepting party, the hearing shall be on the record, supplemented by such additional evidence as the judge considers relevant and to which the parties raise no objection. In either case the hearing shall be limited to those matters to which exceptions have been taken.

d. Review by Court in Absence of Exceptions.

In the absence of timely and proper exceptions, the master's proposed findings of fact, conclusions of law and recommendations may be adopted by the court and the proposed or other appropriate orders may be entered based on them. The court may remand the case to the master for further hearing, or may, on its own motion, schedule and conduct a further hearing supplemented by such additional evidence as the court considers relevant and to which the parties raise no objection. Action by the court under this section shall be taken within two days after the expiration of the time for filing exceptions. (Amended Nov. 5, 1976, effective Jan. 1, 1977.)

The critical rule provisions were once included in Rule 908e 2 and 3. Effective July 1, 1975, the provisions were recodified in Rule 910e, and as a result of the recent amendments to the rules are now incorporated, without substantive changes, in Rule 911c.

Also relevant to this case are the provisions of Rule 910 and of Courts and Judicial Proceedings Article, Section 3-813. These statutory and rule provisions are reprinted at pp. 20a-23a of the Appendix to the Appellant's Jurisdictional Statement.

QUESTION PRESENTED

Whether the District Court erred in determining that the State is barred by the double jeopardy clause of the Fifth Amendment of the Constitution of the United States from taking exceptions to the proposed findings and recommendations of a juvenile master in order to obtain a review on the record by the juvenile judge.

STATEMENT OF THE CASE

Procedure

On November 25, 1974, Appellees[2] instituted this action against Milton Allen, then State's Attorney for Baltimore City; Howard Merker, Chief of Operations, Office of State's Attorney for Baltimore City; Barbara Daly, Chief, Juvenile Court Services Division, Office of State's Attorney for Baltimore City; and James Benton, Deputy Clerk, Circuit Court for Baltimore City, Division of Juvenile Causes, seeking declaratory relief and praying that the Appellants be enjoined from subjecting Appellees to a second trial or disposition pursuant to what was then Rule 908e 2 and 3, (presently Rule 911c) Md. Rules of Procedure, which Appellees alleged violated the Double Jeopardy Clause of the Fifth Amendment, as applied to the states through the Fourteenth Amendment. This action was brought pursuant to 42 U.S.C., Section 1983 and the District Court's jurisdiction was invoked pursuant to 28 U.S.C., Section 1343.

Pending determination of nine habeas corpus petitions filed by the original plaintiffs, the three-judge court stayed consideration of this case. On June 12, 1975, Judge Thomsen granted habeas corpus relief to

[2] Donald Brady; Michael A. Epps; James Love, a minor by Joyce Love, his mother and next friend; Phillip Witherspoon, a minor by Elsie Witherspoon, his mother and next friend; Joseph Fenwick, a minor by William Beckett, his step-father and next friend; William L. Campbell, a minor by William Campbell, his father and next friend; Andre Aldridge, a minor by Ruth Kent, his mother and next friend; George McLean, a minor by Minnie Johnson, his mother and next friend; and Quinton Stewart, a minor by Haynie Stewart, his father and next friend.

six of the plaintiffs, but dismissed the petitions of Brady, Epps and Love without prejudice. See *Aldridge v. Dean,* 395 F. Supp. 1161 (D. Md. 1975).

On July 17, 1975, the Appellants, having been granted leave by the Court to file a supplemental pleading, moved to dismiss the complaint on the ground of mootness since the Maryland Legislature had enacted, effective July 1, 1975, Chapter 554 of the Acts of 1975, Md. Ann. Code, Cts. & Jud. Proc. Art., including new Section 3-813, and the Maryland Court of Appeals had amended Chapter 900 of the Maryland Rules of Procedure, to conform the rules to Chapter 554 of the Acts of 1975 and to the opinion of the District Court in *Aldridge v. Dean, supra.* Former Rule 908e 2 and 3 no longer exist, but were amended and reenacted as Rule 910e (now, Rule 911c), Md. Rules of Procedure. The Appellees were then granted leave to file a supplemental complaint seeking a declaratory judgment that Md. Ann. Code, Cts. & Jud. Proc. Art., Section 3-813 and Rule 910e (911c), Md. Rules of Procedure, violated the Double Jeopardy Clause of the Fifth Amendment and an injunction enjoining the Appellants, Swisher, the current State's Attorney for Baltimore City, Merker, Sheldon Mazelis,[3] Chief of the Juvenile Division, Office of State's Attorney, Baltimore City, and Benton from taking exceptions to findings of non-delinquency or from taking exceptions to dispositions pursuant to Md. Ann. Code, Cts. & Jud. Proc. Art., Section 3-813, and Rule 910e (911c). The Appellants' motion to dismiss this supplemental complaint was denied after a hearing.

Subsequent to the designation of a three-judge court pursuant to 28 U.S.C., Section 2284, Appellees filed a

[3] The Court granted plaintiffs' motion to substitute Swisher for Allen and Gault, and later Mazelis, for Daly. In his complaint Fields only sought relief from Swisher, Gault and Daly.

request for certification as a class. Having found that the numbers of individuals to be joined might prove impracticable, that the requirements of commonality and typicality of law and fact had been met and that the Appellees could adequately represent the interests of the class and were represented by competent counsel, the request was granted. Rule 23(a)(1), F. R. Civ. P. The class was designated as a (b)(2) class under Rule 23 F. R. Civ. P. consisting of all juveniles against whom the State of Maryland had filed exceptions to a master's finding of non-delinquency on or after June 12, 1976. The District Court had previously granted the motion of Stevie Jacobs, Dennis Green and Steven Stencil to intervene as plaintiffs. The Appellants moved for relief from this order since the exceptions filed by the State's Attorney's Office in those cases were later withdrawn. Paul Meadows, on February 20, 1976, and Eugene Fields, on May 21, 1976, also moved to intervene as plaintiffs. The Office of the State's Attorney also withdrew its exception to the findings and recommendations of the master in Meadows' case. As of the time of final argument before the three-judge panel (June 1, 1976) a rehearing was still pending on the exceptions filed by the Office of the State's Attorney in Fields' case, although the State subsequently withdrew its exception.[4] The motion of Eugene Fields to intervene as a plaintiff was granted. The motion of Meadows to

[4] The three judge district court held that the intervention of Eugene Fields saves this case from becoming moot since the State had filed an exception to the master's findings and recommendations which were pending at the time of the hearing (AJS 4a). In the opinion of Appellants'counsel, an actual case and controversy exists, notwithstanding the subsequent withdrawal of these exceptions, because of the designation of this case as a class action. The unnamed members of the class retain a personal stake in the outcome of the controversy, an adversary relationship exists and "a live controversy (remains) at the time this Court reviews the case." *Franks v. Bowman Transportation Company, Inc.,* 424 U.S. 747, 96 S. Ct. 1251, 47 L. Ed. 2d 444 (1976).

intervene was denied and the Appellants were granted relief from the order granting Jacobs, Green and Stencil leave to intervene.

On September 16, 1977, the three judge District Court rendered their decision on this case in a written memorandum and order. The District Court held that Courts Article, Section 3-813 and Maryland Rule 911c are unconstitutional to the extent that these provisions permit the State to file exceptions (a) to a juvenile court master's findings of non-delinquency and try the juvenile a second time, before the juvenile court judge or (b) to a juvenile court master's desposition and seek a new desposition before the juvenile court judge. The District Court ordered that the State be enjoined from taking exceptions in those instances referred to hereinabove.

Facts

A case in Juvenile Court is generally instituted when the office of the State's Attorney files a petition which alleges that the named child under the age of eighteen years is delinquent. (A.7A). If the case is filed in Baltimore City it is assigned (after arraignment) either to the juvenile judge or to one of the seven masters in accordance with Rule 911a.2. The presiding judge of the juvenile court hears originally all petitions for waiver of jurisdiction of the court. Secondly, he hears all exceptions to recommended findings by the masters, on the issue of adjudication and disposition as well as on the issue of detention. In addition, he would normally hear originally the more aggravated types of cases such as murder, rape or armed robbery where those charges are within the jurisdiction of the juvenile court under the provisions of the Maryland Code. Finally, the judge

hears originally all cases wherein the respondent is represented by the Juvenile Law Clinic. (A.45A).[5]

If the case is assigned to a master, the juvenile appears and is advised of his right to counsel. Unless there is a waiver of counsel, the juvenile generally is represented by the office of the Public Defender because in the majority of the cases the juvenile is indigent. (A. 8A). After the petition is read, the Assistant State's Attorney presents his case. Each witness is sworn and subject to direct and cross-examination. After the close of the State's case, the defense normally moves for a dismissal of the petition. If the motion is denied, the defense then presents its case in which the witnesses are also sworn and subject to direct and cross-examination. At the conclusion of the entire case, after hearing argument, the master announces his recommended findings to the parties, explaining the reasons for his recommendations (A. 11-17A). These proceedings are now recorded on tape (A. 44, 49, 55A). If the charges are not sustained, some masters inform the juvenile that the State has the right to take an exception; others do not so inform the juvenile (A. 43, 53A). Under Rule 911(b) the master must submit to the juvenile judge a written statement of his proposed findings of fact, conclusions of law and recommendations. However, in most cases the parties agree to waive the master's written proposed findings of fact and conclusions of law. The memoranda are normally submitted to the juvenile judge when the master has recommended commitment or detention.

Since the new rules became effective July 1, 1975, if an exception is taken, the matter is set for hearing

[5] Since the students who practice as part of that clinic under the supervision of Mr. Smith and Mr. Dantes practice pursuant to Rule 18 of the Rules applicable to admission to the Maryland Bar, the Judge feels a personal responsibility to monitor their performance (A.45A).

before the juvenile judge. An excepting party other than the State may elect a hearing *de novo* or a hearing on the record. If the State is the excepting party, the hearing is on the record, supplemented by such additional evidence as the judge considers relevant *and to which the parties raise no objection.* In either case the hearing is limited to those matters to which exceptions have been taken. In the absence of an exception, the master's proposed findings of fact, conclusions of law and recommendations may be adopted by the court and proposed or other appropriate orders may be entered based on them. However, the court may remand the case to the master for further hearing or may, on its own motion, schedule and conduct a further hearing, supplemented by such additional evidence as the court considers relevant *and to which the parties raise no objection.*

SUMMARY OF ARGUMENT

Appellants submit that the District Court erroneously applied the prohibition on double jeopardy to Maryland's juvenile court master procedures. The determination that allowing the State to take exceptions to the master's proposed findings and conclusion of non-delinquency and to obtain a hearing on the record before a juvenile court judge violates the juvenile's double jeopardy protection is wrong in two respects, as will be fully demonstrated in the argument to follow.

First, the District Court erred in concluding that jeopardy attached at the master hearing because jeopardy does not attach until an accused is brought before a court of competent jurisdiction. A master, who exercises none of the judicial power of Maryland, is not such a tribunal.

Secondly, assuming that jeopardy does attach before the master, the District Court erred in determining that

a master's recommended finding of non-delinquency constitutes a final adjudication and that the hearing before the juvenile court judge therefore constitutes a second, rather than continuing, jeopardy. The error lies in the fact that under the Maryland procedure, the recommendation of the master is not a final resolution of some or all of the factual elements of the offense charged and therefore is not tantamount to an acquittal or to dismissal of the petition.

ARGUMENT

THE DISTRICT COURT ERRED IN DETERMINING THAT THE DOUBLE JEOPARDY CLAUSE BARS THE APPELLANTS FROM TAKING EXCEPTIONS TO THE PROPOSED FINDINGS AND RECOMMENDATIONS OF THE JUVENILE MASTER IN ORDER TO OBTAIN A REVIEW ON THE RECORD BY THE JUVENILE JUDGE.

In the instant case the legal issue, and the only issue presented in the court below, was whether the Appellants were barred by the Double Jeopardy Clause of the Fifth Amendment, as applied to the States through the Fourteenth Amendment, from taking exceptions to the proposed findings and recommendations of a master pursuant to Maryland Rule 911(c) in order to obtain a review on the record by the juvenile judge. Rule 911(c) provides:

> "Any party may file exceptions to the master's proposed findings, conclusions, recommendations or proposed orders. Exceptions shall be in writing, filed with the clerk within five days after the master's report is served upon the party, and shall specify those items to which the party excepts, and whether the hearing is to be *de novo* or on the record. A copy shall be served upon all other parties pursuant to Rule 306 (Service of Pleadings and Other Papers).
>
> Upon the filing of exceptions, a prompt hearing shall be scheduled on the exceptions. An excepting party other than the State may elect a hearing *de*

> *novo* or a hearing on the record. If the State is the excepting party, the hearing shall be on the record, supplemented by such additional evidence as the judge considers relevant and to which the parties raise no objection. In either case the hearing shall be limited to those matters to which exceptions have been taken."

The District Court found that the resolution of this legal issue was dependent upon consideration of two questions: whether jeopardy attached at the hearing before the master and whether the hearing before the master bars a review by the judge of the juvenile court. The court affirmatively answered the first question and rejected the Appellants further argument that, assuming the attachment of jeopardy at the master hearing, jeopardy continues until the final adjudication by the judge. The District Court concluded that Rule 911(c) violates the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution to the extent that the Rule permits the State to file exceptions: (a) to a juvenile court master's findings of non-delinquency and try the juvenile a second time, before the juvenile court judge or (b) to a juvenile court master's disposition and seek a new disposition before the juvenile court judge. The Appellants respectfully submit that the District Court erred in its legal determination of the issues in this case.[6]

---

[6] The District Court considered three model or uniform acts which give the juvenile an option in the first instance to have his case heard before either a master or judge of the juvenile court. After noting that the Maryland statutes and rules do not permit such a right, the Court stated: (AJS 17a)

> "These model pieces of legislation do not deter the extension of the constitutional prohibition against double jeopardy to juvenile proceedings."

While the Appellants agree with this rather broad statement, they fail to understand what bearing the model acts have upon the issue of whether the double jeopardy principle does or does not apply under the facts of this case.

A. Jeopardy Does Not Attach At The Hearing Before The Juvenile Master But Attaches For The First And Only Time When The Juvenile Court Begins To Review The Record Or Hear Evidence Upon Exceptions Filed By The State.

The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb". The early development of this clause can be traced to Greek and Roman law as well as to the common law of England. For a detailed historical discussion of double jeopardy see *Bartkus v. Illinois,* 359 U.S. 121, 151-155, 79 S. Ct. 676, 3 L. Ed. 2d 684 (1959); *United States v. Jenkins,* 490 F.2d 868, 870-873 (CA 2, 1973). This Court has observed that the Double Jeopardy Clause provides three related protections:

> "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce,* 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969).

It is the first of these protections that is at issue in this case.

The double jeopardy clause has been incorporated into the Due Process Clause of the Fourteenth Amendment and is applicable to the States. *Benton v. Maryland,* 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969).

This principle was applied to juvenile proceedings in the recent case of *Breed v. Jones,* 421 U.S. 519, 95 S. Ct. 1779, 1787, 44 L. Ed. 2d 346 (1975), but this Court limited its holding as follows:

"We therefore conclude that respondent was put in jeopardy at the adjudictory hearing. Jeopardy attached when respondent was 'put to trial before the trier of fact' . . . that is, *when the juvenile court, as the trier of facts, began to hear evidence.*" (Emphasis added and Citations omitted).

Although articulated in different ways by this Court, the purposes of and the policies which animate the Double Jeopardy Clause in this context are clear:

"The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. The underlying idea, one that is deeply ingrained in at least the Anglo-American System of Jurisprudence, is that the State, with all of its resources and power, should not be allowed to be make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green v. United States,* 355 U.S. 184, 187-188, 78 S. Ct. 221, 223, 2 L. Ed. 2d 199 (1957).

See also United States v. Jorn, 400 U.S. 470, 479, 91 S. Ct. 547, 554, 27 L. Ed. 2d 543 (1971), and *United States v. Martin Linen Supply Co.,* ___ U.S. ___, 97 S. Ct. 1349, 21 Cr. L. 3001 (decided April 4, 1977).

As an aid to the decision of cases in which the prohibition of the Double Jeopardy Clause has been invoked, this Court has found it useful to define a point in criminal proceedings at which the aforementioned constitutional purposes and policies are implicated by resort to the concept of "attachment of jeopardy." In the case of a jury trial, jeopardy attaches when a jury is impanelled and sworn. In a non-jury trial jeopardy attaches when the Court begins to hear evidence. *Serfass v. United States,* 420 U.S. 377, 388, 95 S. Ct. 1055, 1062 (1975). Simply stated, "the principles given expression through that Clause (double jeopardy) apply to cases tried to a *judge*" (Emphasis Added). *United States v. Jenkins,* 420 U.S. 358, 95 S. Ct. 1006, 1011 (1975).

Within this framework of constitutional principles, the first question to be considered is whether jeopardy attaches at the hearing before the juvenile master. In this regard it becomes important to consider the function and authority of the master, generally appointed by the juvenile court to assist in the performance of the court's duties.[7]

Maryland Constitution, Article 4, Section 1 reads:

"The Judicial power of this State shall be vested in a Court of Appeals, and such intermediate courts of appeal, as shall be provided by law by the General Assembly, Circuit Courts, Orphans' Court, such Courts for the City of Baltimore, as are hereinafter provided for, and a District Court; all said Courts shall be Courts of Record, and each shall have a seal to be used in the authentication of all process issuing therefrom."

It was held in *Mayor and City Council of Hagerstown v. Dechert,* 32 Md. 369, 383-384 (1870) that the General Assembly could not vest judicial power in any other officer except those enumerated in the first section of the Fourth Article of the Constitution of Maryland. Section 3-813 of the Courts and Judicial Proceedings Article of the Maryland Code provides that the judges

[7] Although this case involves the juvenile master system of Baltimore City, juvenile masters are appointed and are currently serving under the Circuit Courts sitting as a juvenile court in other Maryland subdivisions: Baltimore County (2 masters), Anne Arundel County (2), Howard County (1), Carroll County (1) and Harford County (1). In Baltimore City seven (7) masters serve under one (1) judge of the Circuit Court of Baltimore City, Division of Juvenile Causes. Three masters serve in Prince George's County (To be replaced by Circuit Court Judges effective July 1, 1978).

of the Circuit Court and the Supreme Bench of Baltimore City may not appoint a master for juvenile causes unless the appointment and the appointee are approved by the Chief Judge of the Court of Appeals.

Under the Maryland Constitution a master is entrusted with no part of the judicial power of the State. *Matter of Anderson, et al.*, 272 Md. 85, 106, 321 A.2d 516 (1974). In addition, "the proposals and recommendations of a master for juvenile causes do not constitute orders or final action of the court." Courts Article, Section 3-813(d). The master's determinations are not binding until adopted by the court. Courts Article, Section 3-813(d); Maryland Rule 911(d). His function is that of a ministerial officer and advisor to the court. *Matter of Anderson, supra.* The activities of the juvenile master may be likened to those of a traditional master in chancery. It is not within the general province of a master to pass upon all the issues in an equity case, nor is it proper for the court to refer the entire decision of a case to him without the consent of the parties. The Court cannot, of its own motion, or upon the request of one party, abdicate its duty to determine by its own judgment the controversy presented and devolve that duty upon any of its lesser officers. *Kimberly v. Arms,* 129 U.S. 512, 524, 9 S. Ct. 355, 359, 32 L. Ed. 764, 768 (1889).

Maryland's juvenile court law provides for review and adoption, modification or rejection by the judge of the juvenile court of the master's proposed findings of fact, conclusions of law and recommendations. Maryland Rule 911(d). Rule 911 also provides that the juvenile court may remand a case to the master for further hearing, or may, on its own motion, schedule and conduct a further hearing supplemented by such additional evidence as the court considers relevant and to which the parties raise no objection.

This statutory reservation of ultimate authority to the judge of the juvenile court is required by, and is in full accordance with, the State constitution. The juvenile court law directs masters to hear cases assigned by the presiding juvenile court judge but subjects the master's findings and orders resulting from such hearings to procedures for their review by the presiding juvenile judge.

In a similar vein, the case of *Mississippi v. Arkansas,* 415 U.S. 289, 94 S. Ct. 1046, 39 L. Ed. 2d 333 (1974), although not concerned with the double jeopardy principle in a criminal case, illustrates the use of a special master by the Supreme Court of the United States in a case where it had original jurisdiction. Mr. Justice Blackmun there said for the court:

> "Upon our independent review of the record, we find ourselves in complete agreement and accord with the findings of fact made by the Special Master." Id. at 94 S. Ct. 1047.

He concluded that opinion by saying:

> "Upon our own consideration and our independent review of the entire record of the report filed by the Special Master, of the exceptions filed thereto, and the argument thereon, a decree is accordingly entered." Id. at 94 S. Ct. 1049.

As the Court of Appeals of Maryland noted in *Matter of Anderson, supra,* in discussing *Mississippi v. Arkansas, supra:*

> "Surely no one would contend that the recommendation made by a special master after a hearing before him constitutes a final determination of the matters there in dispute." Id. 272 Md. at 105.

Thus, it can be seen that much the same as the Supreme Court employed the use of a master to gather and present evidence and recommendations for the Court's benefit without delegating its judicial power so Maryland does with regard to its juvenile masters under

Chapter 900 of the Rules of Procedure, without delegating to them judicial authority. There is no substantial risk of second prosecutions and second fact finding procedures and contrary adjudications, but rather there is established one specific continuing delineated procedure utilizing the master merely as an advisor to the court. There is no improper delegation of power, there is no judicial authority vested in the master and his findings of fact and conclusions of law are not binding on the trial court even if they are stipulated to.

Both the history of the Double Jeopardy Clause and its terms demonstrate that it does not come into play until a proceeding begins before a trier "having jurisdiction to try the question of the guilt or innocence of the accused." *Kepner v. United States,* 195 U.S. 100, 133, 24 S. Ct. 797, 49 L. Ed. 114 (1904). Without risk of a determination of guilt, jeopardy does not attach and neither an appeal nor further prosecution constitutes double jeopardy. *Serfass v. United States, supra* at 95 S. Ct. 1064.

A few examples will serve to illustrate the application of this rule. In *United States ex rel Rutz v. Levy,* 268 U.S. 390, 293, 45 S. Ct. 516, 517, 69 L. Ed. 1010 (1925) the Court held that a preliminary hearing before a magistrate to determine whether or not there was sufficient evidence to warrant holding the accused for action of the grand jury was not a trial. The accused was not thereby put in jeopardy and his discharge as a result of such hearing did not bar his subsequent prosecution for the offense giving rise to the preliminary hearing.

In *Ocampo v. United States,* 234 U.S. 91, 34 S. Ct. 712, 58 L. Ed. 231 (1914), which came from the Philippine Islands, Mr. Justice Pitney, speaking for the Supreme Court, after referring to the function of committing

magistrates generally as well as under the laws applicable to the Philippines, said:

> "There is no definite adjudication. A finding that there is no probable cause is not equivalent to an acquittal but only entitles the accused to his liberty for the present leaving him subject to rearrest." 234 U.S. 100.

In the instant case, as indicated above, the master has no power to decide the "guilt or innocence" of the juvenile; rather he can only submit proposed findings of fact, conclusions of law and recommendations to the presiding juvenile judge, who may or may not adopt those proposals. Hence, the judge of the juvenile court alone has *jurisdiction* to adjudicate the issue. The master, as pointed out by the State's constitution, statutes, rules and judicial decisional authority, has no such jurisdiction or authority.

Ignoring these principles, the District Court found that jeopardy attached at the master hearing because the hearing "engenders elements of 'anxiety and insecurity' in a juvenile and imposes a 'heavy personal strain', and the juvenile is put to the task of marshalling his resources against those of the State." (AJS 9a). However, the Appellants submit that the District Court put the proverbial cart before the horse in reaching this conclusion. The factors referred to by the District Court *viz.,* protection against anxiety and insecurity etc., are indeed among the underlying policies and purposes to be served by the double jeopardy principle. However, these policies are not factors *determinative* of the "attachment of jeopardy" in a given case. They are only implicated when the accused has actually been placed in jeopardy.

An illustrative comparison will demonstrate the fallacy of the District Court's conclusion. An individual is arrested by the police who have probable cause to

believe that he has committed a larceny. The accused is then taken before a Commissioner for a bail hearing, appears for a probable cause hearing and is then bound over to the Grand Jury. He may appear before the Grand Jury where other witnesses appear and testify under oath. At the conclusion of these proceedings an indictment is returned and the accused is arraigned. Undoubtedly, all of these proceedings call upon the accused to marshall his resources against those of the State and engender elements of anxiety and insecurity and subject the accused to embarrassment, expense and the ordeal of defending against efforts to prosecute him. However, no one would seriously contend that double jeopardy applies in such a case. The obvious reason is that the defendant has not been *tried* before a court of competent jurisdiction. Likewise, in the instant case, since the hearing before the juvenile master is not before a judge or court of competent jurisdiction, capable of adjudicating guilt or innocence jeopardy does not attach. *Serfass v. United States, supra; United States v. Martin Linen Supply Co., supra.*

Because the District Court relied heavily upon this Court's decision in *Breed v. Jones, supra,* to find that jeopardy attached at the hearing before the master, some discussion is necessary to show that the court's reliance on *Breed* was misplaced. There, a petition was filed against the juvenile in the juvenile court of the Superior Court of California, County of Los Angeles, alleging that the juvenile had committed armed robbery. An adjudicatory hearing was held in the juvenile court and the testimony of two prosecution witnesses and the juvenile was taken. At the conclusion of the hearing, the court found that the allegations in the petition were true and sustained the petition. At a disposition hearing the court found the respondent "not amenable to the care, treatment and training program available through the facilities of the juvenile court".

421 U.S. 523. At the request of the respondent, the hearing was continued for a week. At that time, having considered the report and testimony of a probation officer, the court declared the respondent "unfit" for treatment as a juvenile and ordered that he be prosecuted as an adult.

Subsequently a criminal information was filed against the juvenile in the Superior Court charging him with the same armed robbery. That court found respondent guilty and ordered that he be committed to the California Youth Authority. The case eventually reached this Court following appeals through the federal courts on the ground that the juvenile had been twice placed in jeopardy for the same offense by virtue of the successive trials in the juvenile and superior court.

In discussing the double jeopardy principle, Mr. Chief Justice Burger said:

> "Thus, in terms of potential consequences, there is little to distinguish an adjudicatory hearing *such as was held in this case* from a traditional criminal prosecution." 421 U.S. at 530. (Emphasis added)

The Court concluded that the respondent was put in jeopardy at the adjudicatory hearing "when the juvenile court, as the trier of fact, began to hear evidence." *Id.* at 532. The Appellants submit that the clear language of the holding reflects an express intent by this Honorable Court to limit the application of the double jeopardy principle to the specific facts of the *Breed* case. The Court made it clear that it would no longer tolerate State procedures which allow a juvenile to be tried on a criminal charge in a juvenile court and then tried on the same charge in an adult criminal court. However, in the instant case, juvenile proceedings commence in a juvenile court and terminate there. Unlike *Breed,* the case is not first tried in the juvenile court and then transferred to the adult criminal court.

The fundamental and crucial distinction between *Breed* and the present case is that the master makes no adjudication. He merely submits his proposed findings and recommendation to the juvenile court judge. If the State wishes to except to those findings and recommendations, it may do so, but the hearing on those exceptions is on the record of the proceedings before the master unless the juvenile agrees otherwise. There is no initial determination of juvenile delinquency and then a criminal conviction in some other court. There is only one determination *viz.*, juvenile delinquency made by the juvenile court. The Appellants submit that the District Court, in applying *Breed* to the instant case, was unreasonably extending *Breed* in a manner neither expressly nor impliedly contemplated by this Honorable Court.

Based upon our discussion of *Breed,* it is urged, contrary to the opinion of the District Court, that the decisions of the California, Colorado and Arizona courts are viable precedents in support of the Appellants' position. These courts, in rejecting the plea of double jeopardy, sanctioned the use of juvenile referees in much the same way as the master functions in Maryland. See *Bradley v. People,* 65 Cal. Rptr. 570 (1968); *In Re Henley,* 88 Cal. Rptr. 458 (1970); *Jesse W. v. Superior Court of Mateo County,* 133 Cal. Rptr. 870 (1976); *People v. J. A. M.,* 174 Col. 245 (1971); *Matter of Maricopa* etc. 549 P.2d 614 (Ariz. 1976).

In view of what has been said about the absence of jeopardy during the proceedings before the master, attention is next focused upon the proceedings before the juvenile court. In this respect the specific procedure condemned by the District Court was that of exceptions taken by the State to have the juvenile court review the proposed findings and recommendations of the master. Since the proceedings in the juvenile court are before a

judge as opposed to a jury, jeopardy attaches when the court begins to hear evidence. *Serfass v. United States, supra.* In Maryland this would occur when the first witness begins to testify at a *de novo* hearing. However, if the juvenile elects to have the court consider only the record of the proceedings before the master, then jeopardy would attach when the court is first presented with any evidence of the record from the master's hearing.

Appellants respectfully submit that, in accordance with the procedure under the Maryland statutes and rules, there is no violation of the double jeopardy principle because jeopardy does not attach during the proceedings before the master. Rather, jeopardy attaches for the first and only time when the juvenile court receives the case from the masters upon exceptions filed by the State.

B. Assuming jeopardy attaches at the juvenile master hearing, Maryland Procedure contemplates one continuous uninterrupted juvenile proceeding culminating in the decision by the Judge of the juvenile court.

If this Honorable Court decides that jeopardy attaches at the hearing before the master, the Appellants respectfully submit that notwithstanding exceptions filed by the State to the recommendations of nondelinquency or disposition made by the master, jeopardy continues and is concluded by the decision of the judge of the juvenile court.

The concept of "continuing jeopardy" was first given implicit recognition in *United States v. Ball,* 163 U.S. 662, 16 S. Ct. 1192, 41 L. Ed. 2d 300 (1896). The Court expressly rejected the view that the double jeopardy provision prevented a second trial when a conviction

had been set aside. Seventy four years later this Court, in *Price v. Georgia,* 398 U.S. 323, 90 S. Ct. 1757, 26 L. Ed. 300 (1970), held that *Ball,* ". . . effectively formulated a concept of continuing jeopardy that has application where criminal proceedings against an accused have not run their full course." 398 U.S. 326. See also *Green v. United States,* 355 U.S. 184, 189, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957).

The application of the principle to retrial after an acquittal was considered in *Kepner v. United States, supra,* where the Court held that the Fifth Amendment double jeopardy prohibition barred the government from appealing an acquittal in a criminal prosecution over a dissent by Mr. Justice Holmes that there was only one continuing jeopardy until the proceedings against the accused had been finally resolved. Mr. Justice Holmes was of the view that, even if an accused was retried after the government had obtained reversal of an acquittal, the second trial was part of the original proceedings. The Holmesian view seeks to apply the continuing jeopardy principle in a context where the proceeding is continuous, albeit interrupted, by the acquittal of the defendant.

More recently, in *Breed v. Jones, supra,* the Court, noting that the "Holmes view has never been adopted by the majority of this Court", stated that the phrase continuing jeopardy "describes both a concept and a conclusion." 421 U.S. 534. While declining to apply the principle there, the Court seemed to leave the matter open for future consideration in cases where the interests of society, as reflected in the juvenile court system, or the interests of the juveniles themselves, might be of sufficient substance to render tolerable the costs and burdens placed upon juveniles, thus permitting an exception to the double jeopardy principle. 421 U.S. 534-535. In the present case the continuing jeopardy

concept has an even greater emphasis placed upon the word "continuing" than under the Holmes view because, as will be shown below, the proceeding in a Maryland juvenile court is continuous *and is not interrupted,* as in *Kepner, supra,* by an acquittal or by the legal equivalent of an acquittal. In *Breed,* the court was obviously referring to the Holmesian view of continuing jeopardy when it suggested a possible exception to the principle. However, due to the nature of juvenile proceedings in Maryland, the Appellants submit that it is unnecessary for the Court to consider the application of the exception to this case since the context in which the exception was stated (where the proceedings are interrupted by a purportedly final adjudication) is entirely different from the present case where the proceedings are not interrupted by an acquittal or conviction and there is no second trial, but rather one continuous *uninterrupted* proceeding.

The District Court again relied upon *Breed v. Jones, supra,* to conclude that the continuing jeopardy principle does not apply in the instant case, but once again failed to take into account the facts of the *Breed* case. It is apparent that this Court found that an adjudicatory hearing before the judge of a juvenile court sustaining the charges of delinquency does not continue when the juvenile is then charged with the same offense in the adult criminal court. The obvious distinction between *Breed* and the present case is that in *Breed* two separate courts make two separate and distinct determinations *viz.,* delinquency in the juvenile court and conviction of a crime in a criminal court. But in the instant case only one determination, viz., delinquency by the judge of the juvenile court, is made. This determination is made in one continuous uninterrupted proceeding beginning with the master and terminating with the judge of juvenile court.

The crucial issue to be considered is whether the proposed recommendation of non-delinquency made by the master constitutes some form of acquittal or dismissal of the petition resulting in a discontinuance of jeopardy. If so, the exceptions taken by the State could be the equivalent of an appeal from an "acquittal" so that a hearing before the juvenile judge either *de novo* or on the record would be a second jeopardy in violation of the double jeopardy principle.

In this context the District Court, in rejecting the continuing jeopardy theory, cited and discussed the two recent decisions of this Honorable Court of *United States v. Wilson*, 420 U.S. 332, 95 S. Ct. 1013 (1975), and *United States v. Jenkins*, 420 U.S. 358, 95 S. Ct. 1006 (1975). In *Jenkins*, the district court having heard evidence in a bench trial, dismissed an indictment charging the accused with refusing to submit to induction into the armed forces. Although the district court acknowledged that the defendant had failed to report for induction as ordered, it reasoned that the retroactive application of an intervening appellate decision (which would not have allowed a claim of "conscientious objection" to be considered if made after notice of induction had been given) would be unfair and concluded that it could not "permit the criminal prosecution of the defendants . . . without necessarily eroding fundamental and basic equitable principles of law." On this basis, and without entering any general finding of guilt or innocence, the district court dismissed the indictment and discharged the defendant. In concluding that an appeal by the government would violate the double jeopardy clause the Supreme Court held:

> "In those cases, where the defendants had not been adjudged guilty, the Government's appeal was not permitted since further proceedings, usually in the form of a full retrial, would have followed. Here

> there was a judgment discharging the defendant, although we cannot say with assurance whether it was, or was not, a resolution of the factual issues against the Government. But it is enough for purposes of the Double Jeopardy Clause, and therefore for the determination of appealability under 18 U.S.C. Sec. 3731, that further proceedings of factual issues going to the elements of the offense charged, would have been required upon reversal and remand. Even if the District Court were to receive no additional evidence, it would still be necessary for it to make supplemental findings. The trial, which could have resulted in a judgment of conviction, has long since terminated in respondent's favor. To subject him to any further such proceedings at this stage would violate the Double Jeopardy Clause: . . ." 95 S. Ct. at 1013.

In *United States v. Wilson, supra*, the jury entered a guilty verdict against the defendant for a federal offense. Pursuant to one of the defendant's post verdict motions, the district court dismissed the indictment on the grounds that the delay between the offense and the indictment prejudiced the defendant's right to a fair trial. The government noted an appeal. This Court held that when a trial judge rules in favor of the defendant after a guilty verdict has been entered by the trier of fact, the government may appeal from that ruling without contravening the double jeopardy clause. The Court's reasoning was based on the fact that the district court's ruling in defendant's favor could be disposed of on appeal without subjecting the defendant to a second trial at the government's behest.

Relying upon these decisions, the District Court here stated: (AJS 14a)

> "Thus, the Defendant's contention that there is no violation of the Double Jeopardy Clause because the jeopardy continues until a final adjudication by the judge must be rejected. This concept has never been accepted by the Supreme Court in this

context. Review by the juvenile judge would require more than the mere reinstatement of a finding of delinquency; it would require supplemental findings by the judge."

Initially, it is incumbent to note that both *Wilson* and *Jenkins* involved the dismissal of indictments by courts. *Wilson* involved dismissal in a *jury trial* after the jury's verdict and *Jenkins* involved dismissal in a *court trial* at the close of evidence. The District Court here ignored the critical fact that those cases involved the actual dismissal of indictments, and, instead of recognizing the significant difference between the dismissal of an indictment and a master's proposed recommendation of non-delinquency, focused instead upon the hearing of the trial judge in its review of the exceptions. The Appellants would agree that if the master's proposed recommendation was the equivalent of a dismissal of an indictment, then *Wilson* and *Jenkins* would apply. However, since the action of the master is not final, it is not tantamount to a dismissal of the petition or to an acquittal of the charge.

In glossing over this significant distinction, the District Ccourt overlooked the recent decision of this Court in *United States v. Martin Linen Supply Co.*, ___ U.S. ___, 97 S. Ct. 1349, 21 Cr. L. 301 (decided April 4, 1977).[8] While that case is factually distinguishable, and while the Court there reaffirmed the principle that a verdict of acquittal could not be reviewed on error or otherwise without putting a defendant twice in jeopardy and thereby violating the Constitution, it emphasized that:

[8] For two other recent decisions of this Court concerned with the double jeopardy principle in the context of government appeals under facts quite different then those presented in the case at bar, see *Lee v. United States*, ___ U.S. ___, 97 S. Ct. 2141, 21 Cr. L. 3113 (decided June 13, 1977) and *Finch v. United States*, ___ U.S. ___, 97 S. Ct. 2909, 21 Cr. L. 3210 (decided June 29, 1977).

"What constitutes an 'acquittal' is not to be controlled by the form of the judge's action . . . rather, we must determine whether the ruling of the judge whatever its label *actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.*" 97 S. Ct. 1354. (Emphasis added).

In the case at bar the action of the master clearly does not represent a resolution of some or all of the factual elements of the offense charged. Rather, he merely makes proposals or recommendations to the juvenile court judge. These proposals, with or without exceptions filed thereto, may be adopted by the court. In the absence of exceptions, the court may remand the case to the master for a further hearing, or, on its own motion, may schedule and conduct a hearing supplemented by such additional evidence as the court considers relevant and to which the parties raise no objection. In any event, the court is free to reject the recommendations of the master. Thus, under the Maryland system, the resolution of the factual elements is made by a juvenile judge and not by the master. Therefore, as the proposals of the masters do not constitute acquittals or dismissals of the petition, they do not stand as obstacles to the proposition that the hearing which begins with the master and ends with the juvenile judge is one continuous uninterrupted proceeding in which the juvenile is placed once in jeopardy on the charge of delinquency.[9] It follows that the juvenile court judge's continuing jurisdiction over

[9] Alternatively, the argument can be conceptualized on the basis that findings of facts made by a judge at a hearing on the record upon exceptions filed by the state do not represent supplemental findings under *Jenkins* because the masters findings are mere proposals which are not to be supplemented, but are to be adopted or rejected in whole or in part. The judges findings are the first and only legally binding findings made in the case, and thus the hearing before the master followed by the hearing upon exceptions constitutes one single jeopardy.

the case which involves, *inter alia,* a hearing before him upon exceptions filed by the State and an order following the master's conditional finding and order of dismissal do not expose the juvenile to double jeopardy.

CONCLUSION

In summary, Appellants urge that the District Court erred in its holding that jeopardy attaches at the hearing before the juvenile master when the State begins to offer evidence. In addition, assuming the attachment of jeopardy at the master hearing, the Appellants further submit that the district court erred when it held that the Double Jeopardy Clause is violated because jeopardy does not continue until a final adjudication by the judge. On the contrary, it is respectfully submitted that the aforegoing Maryland statutes and rules governing the right of the State to except to the findings and recommendations of the juvenile master in order to seek review before the judge of the juvenile court do not violate the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution. Accordingly, the decision of the District Court of Three Judges for the District of Maryland must be reversed and judgment entered for Appellants.

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General of Maryland,
GEORGE A. NILSON,
Deputy Attorney General,
CLARENCE W. SHARP,
Chief, Criminal Division
Assistant Attorney General,
ALEXANDER L. CUMMINGS,
Assistant Attorney General,
One South Calvert Street,
Baltimore, Maryland 21202,
383-3737,
Attorneys for Appellants.